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FITTERS DIVERSIFIED BHD & ORS v. MOHD ROSLAN MAHAYUDIN & ORS

COURT OF APPEAL, PUTRAJAYA
S NANTHA BALAN JCA
MOHD NAZLAN GHAZALI JCA
B CHOO KAH SING JCA
[CIVIL APPEAL NO: W-01(NCvC)(W)-82-02-2022]
17 JANUARY 2024

C **Abstract** – *(i) Words complained of are defamatory if the said words, as published, in their natural and ordinary meaning, impute to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on its part. An imputation would therefore be defamatory if its effect is to expose the claimant in the eyes of the community to hatred,* D *ridicule or contempt or to lower him in their estimation or to cause him to be shunned and avoided by them. The natural and ordinary meaning of the impugned words includes not only their literal meaning but also any inferences which the ordinary reasonable person could take from the words due to his general knowledge and common sense – in other words,* E *not extrinsic facts passing beyond general knowledge. The words plainly cannot be read in isolation and must instead be read in the proper context they were used in and the meaning must be gathered from the whole publication; (ii) Whilst certain words are defamatory, in order to make out a case in a tort of defamation, these words must also be published* F *and refer to the person who alleges to have been defamed vis-a-vis the publication of these words.*

TORT: *Defamation – Claim – Appeal against decision of High Court – Authorities carried out raid on factory, resulting in seizure of items – Authorities issued press* G *statement on matter which was disseminated to media – Whether impugned statements directed at claimants – Whether damaged reputation and business – Whether reasonable person understood raid to be referring to claimants' warehouse and items seized to be their goods – Whether continued publication of statements constituted malice and was evidence of bad faith – Whether impugned statements defamatory of claimant*

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TORT: *Malicious falsehood – Claim – Appeal against decision of High Court – Authorities carried out raid on factory, resulting in seizure of items – Authorities issued press statement on matter which was disseminated to media – Whether claimants discharged burden that statements were false – Whether claimants had* I *shown that impugned statements were maliciously made – Whether claim for malicious falsehood made out*

This appeal arose from the dismissal of the appellants' claim for defamation and malicious falsehood against the respondents for the published statements issued by the former Ministry of Domestic Trade and Consumer Affairs ('third respondent') at a press conference. The appellants were a group of companies that were primarily involved in the business of manufacturing and trading of fire-resistant door sets, safety, firefighting equipment and other industrial products. The first respondent was the Director of the Enforcement Division of the third respondent. The third respondent's Enforcement Division, on the basis of a complaint against the second appellant made by Doretti Resources Sdn Bhd ('Doretti'), carried out a raid on a factory operated by the second appellant, which resulted in the seizure of many items or products bearing the 'PYRO' trade mark. At that point, relevant documents showed that Doretti was the registered owner of these PYRO goods. The first respondent led a press conference on the raid and on the seizure of the PYRO goods. The third respondent also issued its own press statement on the matter which was disseminated to the reporters from the media institutions who were present. The title of the said press statement was 'Barang Tiruan PYRO' and the news coverage from that day was not only published on the third respondent's Twitter account but also on the online versions of Utusan Malaysia and Harian Metro as well as a blog website. The appellants sued the respondents for defamation and malicious falsehood on the grounds that: (i) the impugned statements were directed at them and had therefore damaged their reputation and business; (ii) since they had been using the word 'PYRO' for a substantial period of time, the reference to the word 'PYRO' would indicate that the statements, especially the words 'barang tiruan' were directed at them; (iii) the use of the word 'PYRO' would mean that a reasonable person would have understood the raid to be referring to their warehouse and items seized to be their goods; and (iv) the continued publication of the statement constituted malice and was evidence of bad faith on the part of the respondents. The defence of the respondents was that: (i) the impugned statements were not defamatory of the appellants as they were not directed at the appellants since no reference was made to the appellants at all; (ii) the statements were made to the public as part of the third respondent's statutory duty under the Trade Description Act 2011 ('TDA'); (iii) in any event, even if the impugned statements were defamatory, the respondents were entitled to rely on the defences of justification and qualified privilege; (iv) the statements they made were as contained in the third respondent's press statement distributed at the press conference. The impugned statements by the media and the blog were not in accordance with the contents of the press statement and the respondents had no control over the statements made by the media and the blog, more so as no confirmation was sought from the respondents in respect of the publication by the media and the blog. The High Court dismissed the appellants' suit. Hence, the present appeal.

A **Held (dismissing appeal; affirming order of High Court)**
Per Mohd Nazlan Ghazali JCA delivering the judgment of the court:

(1) Even though this court disagreed with the High Court in its finding that the impugned statements did not bear any defamatory meaning, this court was in agreement with its conclusion that the same did not refer to the appellants. Whilst words as the raid, the seizure of 'barang tiruan PYRO' and the investigation were defamatory, in order to make out a case in a tort of defamation, these words must also be published (which is not in dispute) and refer to the person who alleges to have been defamed *vis-a-vis* the publication of these words. Based on the totality of the evidence, it could not be concluded that the words referred to the appellants. In the first place, there was no mention of the appellants at all in any of the impugned statements attributed to the respondents, Utusan, Harian Metro or the blog. The impugned statements referred to the trademark 'PYRO' would not without more lead a reasonable reader to understand that it was the second appellant's warehouse that had been raided or that it was the appellants which were being investigated by the third respondent at the material time. This would be the case to a reasonable reader who was even aware that the appellants and their group of companies had been undertaking their trade using the 'PYRO' trademark as claimed by the appellants. (paras 61, 63, 69, 75 & 94)

(2) The reasonable reader is taken not to be susceptible of suspicion; nor is he avid for scandal. The overall tone of the language in the impugned statements was distinctly neutral without suggesting blame to any party *vis-a-vis* the subject matter of 'barang tiruan PYRO'. The reasonable reader would not necessarily assume that it was the appellants' warehouse or factory that was raided since Sungai Buloh was a very large industrial area containing several factories and warehouses out of which many companies operated from. The reasonable reader would merely have understood that the various impugned statements simply affirmed that the first and third respondents were carrying out their investigative duties following a complaint without identifying the warehouse, what more the identities of the suspects. Not only was there no finding of guilt, but also that none could be attributed to any party at that time. The respondents did not make any disparaging remarks directed at any party, any product or any brand or trademark (other than stating the fact about the confiscation of the counterfeit PYRO products). Neither did evidence show that the third respondent had made any announcement of the subsequent prosecution of the directors of the appellants under the TDA or linking the same to the earlier raid. (paras 77-79)

(3) Even if it was true that the appellants were known in the industry to be associated with the 'PYRO' products, news of the authorities seizing fake 'PYRO' products would not necessarily without more lead a reasonable reader to assume and conclude that the culprit was the appellants. It could equally be argued that since the appellants were known for such 'PYRO' products, the counterfeit versions of 'PYRO' must have been or could have been produced by other irresponsible parties. The counterfeit PYRO products could thus have been nefariously produced or sold by a different entity altogether, especially if what was claimed by the appellants that they had substantial goodwill and long-standing business in the PYRO products was true. (paras 80 & 81)

(4) The appellants failed to (i) discharge the burden that the statements were false; and (ii) show that the impugned statements were false or that the respondents had maliciously made such statements against the appellants, considering the facts and circumstances of the case, especially given the reason for the first and third respondents to have made the press conference as authorities responsible for the subject matter of counterfeit consumer goods. It certainly could not be said that the respondents had recklessly made the impugned statements and there was no evidence to even suggest that they did not believe in the truth of the statements. As the claim for malicious falsehood was not made out, it was, as such, correctly dismissed by the High Court. (paras 127-129)

Case(s) referred to:

Abdul Rahman Talib v. Seenivasagam & Anor [1966] CLJU 5; [1966] 1 LNS 5 FC ***(refd)***
Anne Lim Keng See v. The New Straits Times Press (M) Bhd & Anor And Other Appeals [2008] 6 CLJ 697 CA ***(refd)***
Ayob Saud v. TS Sambanthamurthi [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321 HC ***(refd)***
Chase v. News Group Newspapers [2002] ECWA Civ 1772 ***(refd)***
Chew Sew Khian v. Saniboey Mohd Ismail & Ors [2002] CLJU 333; [2002] 1 LNS 333 HC ***(refd)***
Chok Foo Choo v. The China Press Bhd [1999] 1 CLJ 461 CA ***(refd)***
Dato' Dr Low Bin Tick v. Datuk Chong Tho Chin & Other Appeals [2017] 8 CLJ 369 FC ***(refd)***
David Syme v. Canavan [1918] 25 CLR 234 HC ***(refd)***
DHKW Marketing And Another v. Nature's Farm Pte Ltd [1998] 3 SLR (R) 774 ***(refd)***
DP Vijandran v. Karpal Singh & Ors [2000] 6 CLJ 433 HC ***(refd)***
Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Giga Engineering & Construction Sdn Bhd v. Yip Chee Seng & Sons Sdn Bhd & Anor [2015] 9 CLJ 537 FC ***(refd)***
Grappelli v. Derek Block (Holdings) Ltd [1981] 1 WLR 822 ***(refd)***
Iftikar Ahmed Khan v. Perwira Affin Bank Bhd [2018] 1 CLJ 415 FC ***(refd)***
Knupffer v. London Express Newspaper Limited [1944] AC 116 ***(refd)***

A *Kumarasamy Naciappan v. The News Straits Times Press (M) Bhd [2012] CLJU 997; [2012] 1 LNS 997 HC* ***(refd)***
Lim Guan Eng v. Utusan Melayu (M) Bhd [2012] 2 CLJ 619 HC ***(refd)***
Microsoft Corp And Others v. SM Summit Holdings Ltd And Another And Other Appeals [1999] 3 SLR (R) 465 ***(refd)***
B *Mohamad Ezam Mohd Nor & Ors v. Tan Sri Norian Mai & Ors [2013] 3 CLJ 81 HC* ***(refd)***
Morgan v. Odhams Press Ltd [1971] 1 WLR 1239 ***(refd)***
Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***
Ng Koo Kay Benedict and another v. Zim Integrated Shipping Services Ltd [2010] 2 SLR 860 ***(refd)***
C *Nor Azlina Abdul Aziz v. Expert Project Management Sdn Bhd [2017] 5 CLJ 58 CA* ***(refd)***
PB v. RVE [2007] BCJ No. 2305 ***(refd)***
Raub Australian Gold Mining Sdn Bhd v. Hue Shieh Lee [2019] 3 CLJ 729 FC ***(refd)***
Reynolds v. Times Newspapers Ltd and Others [2001] 2 AC 127 ***(refd)***
Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(refd)***
D *Sin Heak Hin Pte Ltd And Another v. Yuasa Battery Singapore Co Pte Ltd [1995] 3 SLR (R) 123* ***(refd)***
SV Beverages Holdings Sdn Bhd & Ors v. Kickapoo (Malaysia) Sdn Bhd [2008] 4 CLJ 20 CA ***(refd)***
Syed Husin Ali v. Sharikat Pencetakan Utusan Melayu Bhd & Anor [1973] CLJU 146; [1973] 1 LNS 146 HC ***(refd)***
E *Tan Sri Dato' Tan Kok Ping, JP lwn. The New Straits Times Press (Malaysia) Bhd & Yang Lain [2010] 3 CLJ 614 HC* ***(refd)***

Legislation referred to:
Defamation Act 1957, s. 8
Evidence Act 1950, s. 103
F Rules of Court 2012, O. 78 r. 3(1)
Trade Description Act 2011, s. 8(2)(b)

Other source(s) referred to:
Gatley on Libel and Slander 10th edn, 2004, para 1.5, p 8
Keith R Evans, *Law of Defamation in Singapore and Malaysia*, 2nd edn, 1993, para 10

G *For the appellants - Damian Kiethan & Nurul Hanani Azamuddin; M/s Raj, Ong & Yudistra*
For the respondents - Zetty Zurina Kamarudin; SFC & Safiyyah Omar; FC

[Editor's note: For the High Court judgment, please see Fitters Diversified Sdn Bhd & Ors v. Mohd Roslan Mahayudin & Ors [2022] CLJU 313; [2022] 1 LNS 313 (affirmed).]
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Reported by Lina E

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JUDGMENT

Mohd Nazlan Ghazali JCA:

Introduction

[1] This appeal arises from the dismissal of the appellants' claim for defamation and malicious falsehood against the respondents for the published statements issued by the third respondent at a press conference held in respect of its seizure of alleged counterfeit goods which the appellants claimed belonged to them.

[2] Having heard the appeal – which was conducted *via* Zoom video technology, examined the appeal records and considered the submissions by parties, we unanimously decided to dismiss the appeal and affirm the judgment of the High Court.

[3] These grounds of judgment contain the full reasons for our decision.

Key Background Facts

The Parties

[4] The appellants are a group of companies that are primarily involved in the business of manufacturing and trading of fire-resistant door sets, safety, firefighting equipment, and other industrial products. The first respondent was at the material time the Director of the Enforcement Division of the former Ministry of Domestic Trade and Consumer Affairs – the third respondent.

The Impugned Statements

[5] The third respondent's enforcement division, on the basis of a complaint against the second appellant made on 3 June 2015 by Doretti Resources Sdn Bhd ("Doretti"), carried out a raid of a factory operated by the second appellant a day after, on 4 June 2015 which resulted in the seizure of many items of product bearing the "PYRO" trademark. At that point, relevant documents showed that Doretti was the registered owner of these PYRO goods.

[6] On 15 June 2015, the first respondent led a press conference on the raid, and on the seizure of the PYRO goods. The third respondent had also issued its own press statement on the matter, which was disseminated to the reporters from the media institutions who were present.

[7] The title of the said press statement is "Barang Tiruan PYRO". News coverage was from that day of 15 June 2015 not only published on the third respondent's Twitter account, but also on the online versions of Utusan Malaysia and Harian Metro as well as a blog website.

[8] For better appreciation of the facts, it is imperative that the statements the appellants complained about in their pleadings ("the impugned statements") be set out hereunder:

(a) Twitter Account of the third defendant

"Rampasan terbesar barang tiruan kelengkapan pintu jenama PYRO dengan anggaran nilai rampasan RM2.46 juta".

(b) Utusan Malaysia – as it appeared on the website www.utusan.com.my

1. "Bahagian Penguat Kuasa Kementerian Perdagangan Dalam Negeri, Koperasi dan Kepenggunaan (KPDNKK) merampas 80,000.00 unit barang perkakasan pintu tiruan berjenama PYRO bernilai RM2.46 juta selepas menyerbu Gudang di Sungai Buloh Selangor ...".
2. "Pengarah Penguat Kuasa Kementerian, Mohd Roslan Mahayudin berkata, serbuan dilakukan selepas pihaknya menerima maklumat daripada Doretti Resources Sdn Bhd berkaitan penggunaan cap dagang berdaftar milik syarikat berkenaan iaitu PYRO yang berdaftar di Perbadanan Harta Intelek Malaysia (MYIPO)".
3. "Siasatan juga mendapati barang tiruan tersebut hampir sama barangan asli milik Doretti Resources Sdn Bhd, kes ini disiasat di bawah seksyen 8(2)(b) Akta Perihal Dagangan 2011 iaitu membekalkan atau menawarkan barangan dagangan palsu."
4. "Jika sabit kesalahan, pemilik barangan tiruan terbabit boleh di denda di bawah seksyen yang sama iaitu bagi suatu pertubuhan perbadanan denda tidak lebih RM15,000 bagi setiap barangan yang diletakkan perihal dagangan palsu."

(c) Harian Metro – as it appeared on the website www.hmetro.com.my

1. "Sebanyak 80,000 unit barang berkelengkapan pintu berjenama tiruan dianggarkan bernilai RM2.46 juta dalam operasi oleh sepasukan penguatkuasa Kementerian Dalam Negeri, Koperasi dan Kepenggunaan (KPDNKK) di sebuah Gudang di Sungai Buloh, Selangor ...".
2. "Barang kelengkapan pintu yang menggunakan cap dagang PYRO itu bukan sahaja menggunakan pek pembungkusan hampir sama, sebaliknya turut memasarkan rangkaian produk sama yang dipasarkan produk jenama asli."
3. "Pengarah Bahagian Penguatkuasa KPDNKK Mohd Roslan Mahayudin berkata, antara barangan tiruan dirampas termasuk pintu rintangan api dan engsel."
4. "Beliau berkata, pihaknya melakukan serbuan berkenaan selepas menerima aduan daripada Doretti Resources Sdn Bhd pemilik cap dagang PYRO mengenai penjualan produk tiruan berkenaan".

5. "Menerusi aduan dibuat, pengadu mendakwa pihak berkenaan mengimport barang tiruan itu dari luar negara sebelum memasarkanya di negara ini."

6. "Hasil pemantauan mendapati, barang tiruan itu dijual bersama-sama barangan asli kerana fizikal, bentuk dan pembungkusannya yang hampir sama selain dijual pada harga yang menyamai produk asli," katanya pada sidang media di sini, semalam."

7. "... kes berkenaan disiasat mengikut seksyen 8(2)(b) Akta Perihal Dagangan 2011 dan jika sabit kesalahan boleh didenda RM 10,000 bagi setiap barang atau penjara tiga tahun manakala syarikat pula boleh di denda RM15,000 bagi setiap barang yang dirampas, katanya".

(d) On a blog with the name known as http:/diabuatdah.blogspot.com

1. "Bahagian Penguat Kuasa Kementerian Perdagangan Dalam Negeri, Koperasi dan Kepenggunaan (KPDNKK) merampas 80,000 unit barangan perkakasan pintu tiruan berjenama PYRO bernilai RM 2.46 juta selepas menyerbu Gudang di Sungai Buloh Selangor."

2. "Pengarah Penguatkuasa Kementerian, Mohd Roslan Mahayudin berkata, serbuan dilakukan selepas pihaknya menerima maklumat daripada Doretti Resources Sdn Bhd berkaitan penggunaan cap dagang berdaftar milik syarikat berkenaan iaitu PYRO yang berdaftar di Perbadanan Harta Intelek Malaysia (MYIPO)".

3. "Dorretti Resources Sdn Bhd membuat laporan kerana cap dagang berdaftar milik mereka iaitu PYRO yang berdaftar dengan MYIPO telah diciplak untuk digunakan pada barangan tiruan yang diimport dari luar negara, barangan yang dirampas dipercayai untuk pasaran tempatan."

4. "Siasatan juga mendapati barang tiruan tersebut hampir sama dengan barangan asli milik Doretti Resources Sdn Bhd, kes ini disiasat di bawah seksyen 8(2)(b) Akta Perihal Dagangan 2011 iaitu membekalkan atau menawarkan barangan dagangan palsu."

[9] For completeness, it should be stated that the appellants also submitted that the aforesaid statements were further aggravated by the description under the picture on Harian Metro's website, stating "Mohd Roslan melihat barang tiruan kelengkapan pintu jenama PYRO di KPNDKK", and on the said blog stating "Mohd Roslan Mahayudin menunjukkan barang kelengkapan pintu tiruan yang dirampas di Sungai Buloh, Selangor, semalam".

The Court Verdict On The Trademark Ownership Of PYRO

[10] Following the raid and seizure, criminal charges were in fact brought against the directors of the second appellant company for offences under s. 8(2) of the Trade Description Act 2011 ("the TDA"). At the same time, the appellants and Doretti were also embroiled in a separate legal dispute on the trademark ownership of the PYRO products.

[11] Significantly, on 24 March 2017, the High Court ruled that the second appellant was the *bona fide* first user and common law owner of the trademark PYRO, such that Doretti's name was ordered to be expunged from the Register of Trademarks. On 4 May 2017, charges against the directors of the second appellant were withdrawn by the third respondent. This decision of the High Court was later affirmed by the Court of Appeal on 5 April 2018.

The Case Of The Appellants

[12] The appellants sued the respondents for defamation and malicious falsehood. They pleaded that the impugned statements were directed at them and had therefore damaged their reputation and business. The appellants' position was that since they believed that they have been using the word "PYRO" for a substantial period of time, the reference to the word "PYRO" would indicate that the statements especially the words "barang tiruan" were directed at them. They asserted that the use of the word "PYRO" would mean that a reasonable person would have understood the raid to be referring to their warehouse and items seized to be their goods.

[13] It was also pleaded that by their ordinary and natural meaning and/or by way of innuendo, the defamatory publication meant or were understood to mean amongst others as follows.

[14] First, pursuant to the third respondent's raid following the complaint lodged by Doretti, the appellants had committed a criminal offence under s. 8(2)(b) of the TDA which carried a sentence upon conviction of a fine not exceeding RM15,000 for each good with the false description, and for a second or subsequent offence, to a fine not exceeding RM30,000 for each good bearing the false trade description or to imprisonment for a term not exceeding five years or both prison and fine for the appellants' directors.

[15] Secondly, pursuant to the raid, and after allegedly having investigated the complaint, the third respondent made a finding that the appellants' "PYRO" products were goods bearing false trade description by virtue of first respondent describing it as "barang tiruan".

[16] Thirdly, in light of the third respondent's raid and the discovery of the "barang tiruan" in the appellants' warehouse, the appellants had conducted their trade and business by wrongful means; in a dishonest, improper and reprehensible manner and lacked integrity – by employing "barang tiruan".

[17] Given the raid and seizure of the "barang tiruan" in the appellants' warehouse, the appellants were not the lawful and registered owners of the trademark "PYRO" and had thus defrauded the business and public communities of Malaysia and abroad by representing as such all this while.

[18] More significantly, the appellants alleged that they were aggrieved in that the impugned statements were continuously published even after the civil suit on the issue of ownership of the trademark "PYRO" had been resolved in favour of the appellant. Publication on the third respondent's Twitter was from 15 June 2015 until 20 September 2018. Whilst the republication of the first respondent's statements on Utusan Malaysia, Harian Metro and the said blog website was all from 15 June 2015 to 22 February 2021.

[19] The appellant therefore contended that the continued publication of the said statement constituted malice and was evidence of bad faith on the part of the respondents.

The Defence Of The Respondents

[20] The crux of the defence of the respondents was their position that the impugned statements were not defamatory of the appellants, principally by asserting that the said statements were not directed at the appellants to begin with since no reference was made to the appellants at all. It was also pleaded that the statements were made to the public as part of the third respondent's statutory duties under the TDA. In any event, even if the impugned statements were defamatory, the respondents were entitled to rely on the defences of justification and qualified privilege.

[21] The respondents further claimed that the statements they made were as contained in the third respondent's press statement distributed on that 15 June 2015 at the press conference, but that the impugned statements by the media and the blog were not in accordance with the contents of the press statement. The respondents had no control over the statements made by the media and the blog, more so as no confirmation was sought from the respondents in respect of the publication by the media and the blog.

The Essence Of The Decision Of The High Court

[22] The High Court dismissed the appellants' suit for defamation and malicious falsehood. For present purposes, it ought to be highlighted that the court principally ruled that the words "Barang Tiruan PYRO" did not refer to the appellants. Further, it was also first held that the use of the words "Barang Tiruan PYRO" in the impugned statements attributed to the first and third respondents did not bear any defamatory meaning when published as at the date of the press conference on 15 June 2015.

[23] It therefore followed that since the impugned statements were not defamatory, despite the continued publication of the impugned statements, the respondents cannot be held liable due to an alleged change of circumstances which resulted from the decision of the High Court on the trademark ownership of PYRO on 24 March 2017.

A **Primary Grounds Of Appeal**

[24] The grounds of appeal of the appellants *vis-à-vis* the dismissal of their suit by the High Court may be fairly grouped in terms of four principal arguments. The first is that the High Court was wrong in its finding that the words "Barang Tiruan PYRO" in the impugned statements were not
B defamatory or maliciously false. In other words, the High Court was in error when it held that the statements did not bear any of the above-stated defamatory imputations as pleaded by the appellants.

[25] Secondly, the appellants maintained that it was erroneous for the High
C Court not to have found defamation in respect of the continued publication on the third respondent's own Twitter, on Utusan Malaysia, Harian Metro and the earlier mentioned blog, of the impugned statements, particularly the reference to "Barang Tiruan PYRO" despite and after the High Court decision on 24 March 2017 which had determined that the trademark ownership of the PYRO products validly vested in the second appellant. The
D appellants contended that the continued publication without retraction or correction each day after the said decision constituted a fresh accrual of the cause of action for defamation and malicious falsehood against the respondents.

E **[26]** Thirdly, the appellants submitted that even though the impugned statements and the words "Barang Tiruan PYRO" did not expressly mention the name of the appellants, evidence at trial did establish that on a balance of probabilities such defamatory imputations concerning "Barang Tiruan PYRO" referred to the appellants.

F **[27]** Fourthly, the appellants contended that the High Court erred in law in concluding that the respondents were entitled to the defence of qualified privilege and of justification.

[28] Other issues raised by the appellants in their memorandum of appeal and their written and oral submissions are largely related to any one of more
G of the aforesaid four principal areas of appeal. These four will be examined next. But before that, it would be helpful to refer briefly to the principles governing appellate intervention.

Principles On Appellate Intervention

H **[29]** The law is well-established in that an appellate court will not interfere unless the trial court is shown to be plainly wrong. The Federal Court in *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; [2015] 2 MLJ 441, in the judgment written by Azahar Mohamed FCJ (later CJM) reaffirmed the principle to be followed by an appellate court when reversing findings of fact by a trial court:
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> [60] It is now established that the principle on which an appellate court could interfere with findings of fact by the trial court is 'the plainly wrong test' principle; see the Federal Court in *Gan Yook Chin (P) & Anor v. Lee*

Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1 (at p 10) per Steve Shim CJ (Sabah & Sarawak). More recently, this principle of appellate intervention was affirmed by the Federal Court in *UEM Group Bhd v. Genisys Intergrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785 where it was held at p. 800:

> It is well settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence (see *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 1 LNS 32; *Watt v. Thomas* [1947] AC 484; and *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309).

[30] The Court of Appeal in *Nor Azlina Abdul Aziz v. Expert Project Management Sdn Bhd* [2017] 5 CLJ 58 in the judgment of the court delivered by Harmindar Singh JCA (now FCJ) held thus:

> [20] Nevertheless there are occasions when appellate interference is warranted and these occasions have been well set out in numerous cases. Some of these occasions are:
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> (a) where the trial judge took into account irrelevant considerations and failed to give due weight to relevant considerations (see *Director of Forestry, Sabah & Anor v. Mau Kam Tong & Ors And Another Appeal* [2010] 3 CLJ 377; [2010] 3 MLJ 509);
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> (b) where there was no proper evaluation of the evidence by the trial judge (see *Lee Nyan Hon & Brothers Sdn Bhd v. Metro Charm Sdn Bhd* [2009] 6 CLJ 626; [2009] 6 MLJ 1);
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> (c) where the decision arrived at by the trial court was without judicial appreciation of the evidence (see *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1);
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> (d) where a trial court has so fundamentally misdirected itself, that no reasonable court which had properly directed itself and asked the correct questions, would have arrived at the same conclusion (see *Raja Lob Sharuddin Raja Ahmad Terzali & Ors v. Sri Seltra Sdn Bhd* [2008] 2 CLJ 284; [2008] 2 MLJ 87);
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> (e) where the trial judge was plainly wrong in arriving at his decision (see *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97);
>
> (f) where a trial judge had so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial, and in reaching his conclusion, has not properly analysed the entirety of the evidence which was given before him (see *First Count Sdn Bhd v. Wang Yew Logging & Plantation Sdn Bhd* [2013] 1 LNS 625; [2013] 4 MLJ 693 which followed the Privy Council case of *Choo Kok Beng v. Choo Kok Hoe & Ors* [1984] 1 LNS 40; [1984] 2 MLJ 165); and

A (g) where the judgment is based upon a wrong premise of fact or of law (see *Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd* [2012] 1 LNS 1416; [2012] 4 MLJ 149).

[31] In a more recent Federal Court pronouncement on the principles surrounding appellate intervention in *Ng Hoo Kui & Anor v. Wendy Tan Lee*
B *Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1 which cited the decision of the Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1 it was reaffirmed that the position has always been that a decision which is arrived at due to a lack of judicial appreciation of evidence is plainly wrong.

C **Evaluation And Findings Of This Court**

Elements Of The Tort Of Defamation

[32] For proper context, before we analyse whether the cause of action of defamation is made out, we should in summary fashion state the key
D elements of the tort of defamation that must be proven by the appellants. The key elements of defamation are well-established. In order to prove a claim of libel in defamation, it is essential that the offending words not only bear defamatory imputation, but also that they identify the plaintiff as the person defamed and are published to a third party. It is for the plaintiff as the
E claimant, to prove these three elements in order to succeed in his defamation action.

[33] All these were made abundantly plain in *Ayob Saud v. TS Sambanthamurthi* [1989] 1 CLJ 152; [1989] 1 MLJ 315, where Mohamed Dzaiddin J (later Chief Justice) held that:

F > In our law on libel, which is governed by the Defamation Act 1957, the burden of proof lies on the plaintiff to show (1) the words are defamatory; (2) the words refer to the plaintiff; and (3) the words were published.

[34] In this case before us however, the fact that there were publications of the impugned statements – specifically the mention of "Barang Tiruan
G PYRO" – in the third respondent's Twitter account, on the online news of Utusan, of Harian Metro and on the said blog are not disputed. This fact was also one of the agreed facts confirmed prior to the start of the trial. And given the said medium of communication and the purpose of the coverage, it is equally not in dispute that these publications were plainly and obviously
H made to third parties, being the readers. As such, this element of the tort of defamation was not an issue raised by any of the parties. The opposite however is true for the other two elements, as reflected in the key ground of appeals raised by the appellants.

I

Whether The Impugned Statements And References To "Barang Tiruan PYRO" Bear A Defamatory Meaning Or Imputation

[35] The leading text on defamation – *Gatley on Libel and Slander* 10th edn (2004) at para. 1.5 p. 8 states as follows:

> What is defamatory? There is no wholly satisfactory definition of a defamatory imputation. Three formulae have been particularly influential:
>
> > (1) Would the imputation tend to 'lower the plaintiff in the estimation of right-thinking members of society generally'? (2) Would the imputation tend to cause others to shun or avoid the plaintiff? And (3) Would the words tend to expose the plaintiff to 'hatred, contempt or ridicule'? The quotation "what is defamatory?" relates to the nature of the statement made by the defendant: words may be defamatory even if they are believed by no one and even if they are true, though in the latter case they are not, of course, actionable ... .

[36] As mentioned, the test of whether a statement published or spoken is defamatory is well-established. In *Syed Husin Ali v. Sharikat Pencetakan Utusan Melayu Bhd & Anor* [1973] CLJU 146; [1973] 1 LNS 146; [1973] 2 MLJ 56, Mohd Azmi J (as he then was) formulated the test as follows:

> Thus, the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. Another test is: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? The typical type of defamation is an attack upon the moral character of the plaintiff attributing crime, dishonesty, untruthfulness, ingratitude or cruelty.

[37] As for the concept of ordinary and natural meaning, *Duncan & Neill on Defamation*, 4th edn, explained as follows at paras. 5.25 to 5.28:

> In order to determine the natural and ordinary meaning of the statements of which the claimant complains it is necessary to take into account the context in which it appeared and the mode of publication ... It follows from the principles set out above that a claimant cannot select an isolated passage in an article and complain of that alone if other parts of the article throw a different light on that passage.

[38] In order to ascertain whether this important element is established courts have followed a two-stage test. Essentially, the first is whether the impugned words are capable of bearing a defamatory meaning and secondly whether they in fact bear the meaning alleged. The first stage is a question of law, and the second is one of fact. Further, elucidation on the application of the relevant principles in this respect may be found in the decision of the Court of Appeal in *Chok Foo Choo v. The China Press Bhd* [1999] 1 CLJ 461; [1999] 1 MLJ 371; [1999] 1 AMR 753 where Gopal Sri Ram JCA (as he then was) stated thus:

A It cannot, I think, be doubted that the first task of a court in an action for defamation is to determine whether the words complained of are capable of bearing a defamatory meaning. And it is beyond argument that this is in essence a question of law that turns upon the construction of the words published. As Lord Morris put it in *Jones v. Skelton* [1963] 3 All ER 952 at p. 958:

B

> The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a
C part of the ordinary and natural meaning of words (see *Lewis v. Daily Telegraph Ltd* [1963] 2 All ER 151). The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader, guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction, would draw from the words. The test of
D reasonableness guides and directs the court in its function of deciding whether it is open to a jury in any particular case to hold that reasonable persons would understand the words complained of in a defamatory sense.

In my judgment, the test which is to be applied lies in the question: do
E the words published in their natural and ordinary meaning impute to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part? If the question invites an affirmative response, then the words complained of are defamatory. (See *JB Jeyaretnam v. Goh Chok Tong* [1985] 1 MLJ 334). Richard Malanjum J, in an admirable judgment in *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v. Bre Sdn Bhd*
F *& Ors* [1996] 1 MLJ 393, collected and reviewed the relevant authorities upon this branch of the subject and I would, with respect, expressly approve the approach adopted by him.

...

Having decided whether the words complained of are capable of bearing
G a defamatory meaning, the next step in the inquiry is for a court to ascertain whether the words complained of are in fact defamatory. This is a question of fact dependent upon the circumstances of the particular case.

[39] And, in *Raub Australian Gold Mining Sdn Bhd v. Hue Shieh Lee* [2019]
H 3 CLJ 729; [2019] 3 MLJ 720 the Federal Court emphasised:

> [38] The test involved in determining whether or not the words complained of are defamatory is a two-stage process. Firstly, it must be considered what meaning the words would convey to an ordinary person; and secondly, it must be considered whether under the circumstances in
I which the words were published, a reasonable man would be likely to understand that in a defamatory way (see: *Wong Yoke Kong & Ors v. Azmi M Anshar & Ors* [2003] 6 CLJ 559; [2003] 4 MLJ 96).

[40] In light of the authorities, the words complained of are defamatory if the said words, as published, in their natural and ordinary meaning impute to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on its part. An imputation would therefore be defamatory if its effect is to expose the plaintiff, in the eyes of the community, to hatred, ridicule or contempt or to lower him in their estimation or to cause him to be shunned and avoided by them. To be clear, the natural and ordinary meaning of the impugned words includes not only their literal meaning but also any inferences which the ordinary reasonable person would take from the words due to his general knowledge and common sense – in other words, not extrinsic facts passing beyond general knowledge. The words plainly cannot be read in isolation and must instead be read in the proper context they were used, and the meaning must be gathered from the whole publication.

[41] Words can also be defamatory in their innuendo sense where whilst they may not be defamatory to the ordinary reasonable person, are instead defamatory to persons with knowledge of extrinsic facts. Here, it bears repetition that in this case, as set out above (in paras. [12] to [15]) the appellants had pleaded what they said the ordinary and natural meaning of the impugned words "Barang Tiruan PYRO" are, and what imputation they carried, as well as their innuendo meaning.

[42] Essentially the appellants alleged, as they pleaded, that the words meant that the appellants had committed a criminal offence under s. 8(2)(b) of the TDA, that the appellants' "PYRO" products were goods bearing false trade description, that the appellants had conducted their trade and business by wrongful means, and in a dishonest, improper, reprehensible manner as well as lacked integrity, and that the appellants were not the lawful and registered owners of the trademark "PYRO" and had thus defrauded the business and public communities of Malaysia and abroad by representing as such all this while.

[43] The High Court disagreed. This is how the learned JC explained his findings on this issue, which we think useful to reproduce:

> [42] When I consider the statements made in the said Twitter account and the websites of the newspapers as well as on the blog, I am of the opinion, that a reasonable reader would have understood that:
>
> (i) A raid was undertaken by the Defendants on 5-6-2015 pursuant to a complaint by the then registered proprietor of the trademark "PYRO", Doretti Sdn Bhd, that counterfeit products bearing the same brand name were confiscated at a warehouse in Sungai Buloh.
>
> (ii) The counterfeit product confiscated included fire-resistant doors and door accessories bearing the trademark PYRO and bearing a similar physical appearance and packaging utilised under the PYRO trademark.

(iii) An investigation is underway in accordance with section 8(2)(b) of the Trade Descriptions Act and if found liable the guilty party may be made liable for the sum of RM10,000.00 for each item found, imprisonment and the corporation may be liable for the sum of RM15,000.00. The statements clearly state "Jika disabit kesalahan", this would indicate that the issues are still pending investigation and such persons may be found liable if they were found guilty by a court of law.

[43] Therefore, I find that the natural and ordinary meaning of the articles are not defamatory as suggested by the plaintiffs. I believe a reasonable reader would not impute the meaning as suggested by the plaintiffs. This would even extend to a reasonable reader who knew that the plaintiffs and the group of companies in the FITTERS group had been undertaking its trade utilising the "PYRO" trademark or related trademark (hereinafter referred collectively as "PYRO") as suggested by the plaintiffs.

[44] The fact that the statements refer to the trademark "PYRO" will not automatically lead a reasonable reader to assume or understand that it was the plaintiffs' warehouse that was raided and that it was the Plaintiffs that were being investigated by the defendants at the material time. As seen earlier, the reasonable reader is assumed not to be susceptible of suspicion and not an avid fan [*sic*] of scandal.

[45] I am also of the view that the reasonable reader would have understood that the statements indicate that the Defendants, in particular, the 1st and 3rd Defendants had only at the time of the publication had raided an unidentified premise on the allegation made by the then owner of the trademark, Doretti Resources Sdn Bhd. A reasonable person reading the newspaper report, the blog and the press release, would understand the articles to mean that the Defendants had undertaken an investigation based on the complaint of the registered trademark owner and raided a warehouse that they suspect contains pirated goods. As of 18-6-2015, the Defendants only stated that they were undertaking an investigation and no finding of guilt could be attributed to any party at that time. The Defendants also did not make any disparaging remarks to any party, to any product or any brand or trademark. They had only stated what they had undertaken as of 18-62015 as part of their duties.

[44] We are inclined to agree with the High Court. To a certain extent. We understand from the above that the High Court did not consider the impugned statements defamatory primarily because first, the raid of the warehouse and the confiscation of the stated "Barang Tiruan PYRO" was clearly being undertaken as part of the third respondent's investigation and secondly, that no mention was therein made of the appellants at all.

[45] Whilst we agree that the impugned statements made no mention of the appellants (which we find to be especially crucial, as discussed below) we do not share the finding of the High Court that words stating matters such as

counterfeit goods or "Barang Tiruan PYRO", raid on warehouse, and an on-going investigation, if published in reference to a plaintiff, did not bear any defamatory imputation.

[46] We should briefly say that in the case of *Ng Koo Kay Benedict and another v. Zim Integrated Shipping Services Ltd* [2010] 2 SLR 860 reference was made to the English case of *Chase v. News Group Newspapers* [2002] ECWA Civ 1772 which categorised three levels of meanings which could be stated as – first, the imputation of the commission of an offence, secondly the existence of reasonable grounds to suspect the commission of the offence and thirdly, the presence of grounds to investigate into the same. However, *Ng Koo Kay Benedict* observed that "All three [*Chase*] levels are generally regarded as being defamatory, though in varying degrees".

[47] In other words, in our view, words such as the raid by an enforcement agency of a warehouse as part of an investigation where counterfeit goods were confiscated would be defamatory of the person who is being investigated, whose factory is raided, and whose products have been seized.

[48] Cases where the impugned words concerning some accusation or allegation of criminal conduct have been held to be defamatory include *DP Vijandran v. Karpal Singh & Ors* [2000] 6 CLJ 433; [2000] 3 MLJ 22 where the words referred to the allegation of cheating under s. 420 of the Penal Code; and perhaps more similar to the instant case before us, *Sin Heak Hin Pte Ltd And Another v. Yuasa Battery Singapore Co Pte Ltd* [1995] 3 SLR (R) 123 where the allegation was on the sale of counterfeit car batteries; *DHKW Marketing And Another v. Nature's Farm Pte Ltd* [1998] 3 SLR (R) 774 where the allegation was on the sale of counterfeit health product; and *Microsoft Corp And Others v. SM Summit Holdings Ltd And Another And Other Appeals* [1999] 3 SLR (R) 465 where the allegation was on the sale of counterfeit software.

[49] We reiterate that in our judgment, the impugned statements which contained the words raid, seizure, and investigation *vis-à-vis* the expression "Barang Tiruan PYRO" – the very words complained of by the appellants, even if described instead as "disyaki Barang Tiruan PYRO" when examined in the context of the entirety of all of the impugned statements in a reasonable and objective manner, **if they were in reference to the appellants herein** (emphasis added), would certainly carry the imputation, if not the direct meaning, which would tend to "lower the appellants in the estimation of right-thinking members of society generally" (*Gatley on Libel and Slander* 10th edn, (2004) at para. 1.5 p. 8), have the tendency "to excite against the appellants the adverse opinion of others" (*Syed Husin Ali* (*supra*)), and "impute to the appellants any dishonourable or discreditable conduct or motives or a lack of integrity on his part" (*Chok Foo Choo* (*supra*)).

[50] It bears emphasis that after all, as stated in *Chok Foo Choo* (*supra*), the ordinary and natural meaning of the impugned words may be either the literal meaning or it may be an implied or inferred or an indirect meaning: in the sense that it is a meaning that does not require the support of extrinsic facts passing beyond general knowledge. We therefore find that the words "Barang Tiruan PYRO" are certainly capable of a defamatory meaning in the context of the first in a two-stage test to ascertain whether the relevant impugned statements are defamatory of the appellant. We emphasise that the first stage is a question of law as to whether the impugned words are capable of bearing a defamatory meaning in terms of what would the words convey to an ordinary person. We have just answered this in the affirmative, somewhat departing from the answer given by the High Court.

[51] In respect of the second stage where it must be asked whether under the circumstances in which the words were published, a reasonable man would likely to understand that in a defamatory way. This concerns a question of fact, as to whether the words in fact bear the meaning alleged. Again, we find it compelling to hold that the said words "Barang Tiruan PYRO" in the circumstances of the case, considering the background facts, the raid, seizure and investigation, which are all published in the impugned statements as appeared on the third respondent's Twitter, in Utusan, Harian Metro and the blog, did in fact carry the defamatory meaning.

[52] As such, the first element of the tort of defamation had been made out since the impugned statements made and published in this case are defamatory, either by way of their ordinary meaning or by innuendo.

[53] Before discussing the other element of defamation, we wish to state that the appellants herein in our view gave too much emphasis on their grievance that the impugned statements all mentioned "Barang Tiruan PYRO" despite the appellants then were merely **suspected** of selling or supplying the said "Barang Tiruan PYRO" (emphasis added). As such, the appellants insisted that without qualifying the statements by employing the word "suspected" or "disyaki", the respondents had defamed the appellants.

[54] It bears repetition that at the time of the press conference on 15 June 2015, the investigations into the status of the PYRO products which had been confiscated – whether fake or genuine – was still on-going. In their submissions, the appellants stressed that the third respondent's own officers when testifying agreed that the third respondent was merely (in this context) an investigative body, and the question whether a particular product was a counterfeit or otherwise would be a matter for the court to decide, not the third respondent.

[55] When an enforcement agency like the third respondent or for that matter, the police, calls for a press conference or issues statements to the media to announce to the public certain discoveries or arrests undertaken

pursuant to investigations under their respective remits, we do not for a moment think that the status of these seizures and arrests are in any manner conveyed or intended to be understood by any reasonable reader to be definitive. In all likelihood investigations are still in progress, just like in the instant case when the press conference was held on 15 June 2015.

[56] And we would certainly like to think that it would by now generally be understood by the ordinary and reasonable reader if not the general public that the determination on the status of any items seized or persons arrested – whether counterfeit or illegal or otherwise, and whether guilty or not – will only be conclusively made by the courts (if brought before the courts) pursuant to the justice system in this country.

[57] In other words, whether the words "Barang Tiruan PYRO" ought to have been qualified by the word "disyaki" as argued by the appellants is in our view immaterial as any such announcement or statement by enforcement agencies must in any event be taken as non-definitive as to the legal status of the underlying matter being investigated.

[58] In our view therefore, "Barang Tiruan PYRO" even if qualified with "disyaki" and despite its legal status in any event being non-conclusive as yet, would objectively still be viewed by a reasonable reader to be a negative term which would have the effect of lowering the reputation of the person associated with the said expression. This, in comparison, would be no less defamatory of a person who is announced by authorities to have been arrested for suspicion of committing a criminal offence.

Whether The Impugned Words Refer To The Appellants

[59] Now, given that it has been established that the impugned statements bear defamatory meanings and imputations, the appellants must show that the defamatory words in question were published of and concerning the appellants. The words must be capable of referring to them or of identifying them.

[60] However we must point out that whilst we found the impugned words to be defamatory, it is not at all the case that the appellants had succeeded in showing that the ordinary and natural meaning of the impugned statements and the imputation they bore was **in the manner how the appellant had set out in their pleadings** as stated in paras. [12] to [19] above (emphasis added). This is because whilst we say the impugned statements bear defamatory imputation under the first element of the tort of defamation, the meaning of the impugned statements as ascribed to and pleaded by the appellants, had already combined or married the two key elements of defamation in this case – namely that the words must bear a defamatory imputation and that they refer to the appellants. We reiterate that we find the impugned statements in the publication to be defamatory. But we disagree they refer to the appellants.

[61] In other words, whilst words such as the raid, the seizure of "Barang Tiruan PYRO" and the investigation are defamatory, as mentioned earlier, in order to make out a case in a tort of defamation, these words must also be published (which is not in dispute) and refer to the person who alleges to have been defamed *vis-à-vis* the publication of these words.

[62] However in this case, what the appellants had pleaded (as stated in paras. [12] to [19] above) as to how these words had defamed them presupposed that the impugned statements as made by the first and third respondents actually are in reference to the appellants. We stress that unless it is proved that the subject matter of the action was published of and concerning the plaintiff, the action is bound to fail (see *Chew Sew Khian v. Saniboey Mohd Ismail & Ors* [2002] CLJU 333 [2002] 1 LNS 333; [2003] 5 MLJ 91).

[63] Based on the totality of the evidence, we are unable to conclude that the words referred to the appellants. We should also say that the High Court too did not find the impugned statements defamatory of the appellants. We need only state that for all intents and purposes, whilst we did not share the same conclusion with the High Court on the issue of whether the impugned words bore any defamatory imputation, we are nevertheless in full agreement with the High Court that they do not refer to the appellants.

[64] This as touched on earlier is also one main reason why the High Court determined the words were not defamatory, since in its analysis of the issue of whether the words did bear any defamatory imputation (the first element in the tort of defamation), much emphasis had already been placed on the finding that the impugned statements had nothing to do with the appellants, which under the law, is concerning the second element in the tort of defamation.

[65] This comes out clearly in the grounds of judgment of the High Court where under the discussion topic of "whether the impugned statements refer to the plaintiffs" in para. 71 it is stated that the "second part of this two-stage test concerns whether the words or statements are defamatory of the plaintiffs". This is not entirely erroneous. But it is trite that the two-stage test is the test to determine the first of three elements to find a cause of action in defamation – which is whether the impugned statements bear a defamatory imputation. The second is whether they refer to the appellants as the plaintiffs and the third is whether they are published to a third party. In our analysis, the High Court had already considered the second element in the first, thus unnecessarily conflating the issues somewhat.

[66] We therefore repeat the following passage from the judgment of the Federal Court in *Raub Australian Gold Mining Sdn Bhd* (*supra*) on the two-stage test *vis-à-vis* the first element on the determination whether the impugned words bear defamatory imputations, as follows:

> [38] The test involved in determining whether or not the words complained of are defamatory is a two-stage process. Firstly, it must be considered what meaning the words would convey to an ordinary person; and secondly, it must be considered whether under the circumstances in which the words were published, a reasonable man would be likely to understand that in a defamatory way (see: *Wong Yoke Kong & Ors v. Azmi M Anshar & Ors* [2003] 6 CLJ 559).

[67] In our view, as is clear from the above, judicial determination on whether the impugned statements refer to or identify the plaintiff should rightfully be made in the analysis of the second element, and less so in the first, which focusses on whether in the first place, the words in question bear defamatory meaning or imputations. In any event, in the instant case before us, whilst we, unlike the High Court, find the impugned statements did bear defamatory imputations, we nevertheless agreed with the High Court that the action in defamation cannot be sustained because it has not been proven that the impugned statements refer to or identify the appellants.

[68] In our view, the impugned statements, as published, do not refer to the appellants. Our reasons for saying so are as follows.

[69] In the first place, there was without any doubt no mention of the appellants at all in any of the impugned statements attributed to the respondents, Utusan, Harian Metro or the blog.

[70] It is true that it is not necessary that a plaintiff must be mentioned by name in the publication in question – but to succeed in the action in defamation, he must show that there are matters in the defamatory publication that describe or identify him. A careful reading of the entire press statement in the impugned statements in this case discloses absolutely no mention of the appellants. And it cannot be emphasised enough that nowhere in the statements is it stated that the warehouse had anything to do with the appellants.

[71] Therefore, it bears repetition that the essence of the impugned statements, as attributed to the first and third respondents was merely that based on the complaint by Doretti (then evidenced to be the registered owner of the PYRO trademark), in respect of the use and sale of counterfeit products using the said PYRO trademark, the raid was conducted by the enforcement team of the third respondent at a warehouse in Sungai Buloh. There and then, various counterfeit PYRO items (which included fire-resistant doors and door accessories bearing the trademark PYRO and bearing a similar physical appearance and packaging utilised under the PYRO trademark) were confiscated as a result. The investigation was being carried out under s. 8(2)(b) of the TDA which provided for the punishment of fine and imprisonment if found guilty.

[72] We are mindful that the appellants contended that the statements referred to them and pleaded that the second appellant had started providing fire services using the trademark PYRO since 1986, and other related products in combination with other words such as PYRODOR, PYROSUIT and PYROLINE. In 2001, the third appellant started the use of PYRO for products such as locks and ironmongeries, with the first appellant being engaged to manufacture and supply the same. Thus, the appellants had over the years recorded substantial sales, and undergone certification and examination of their PYRO products, resulting in their having acquired substantial reputation and goodwill.

[73] As such, it was specifically pleaded that relevant trade and business organisations, as well as the public have come to associate PYRO trademark and PYRO products with the appellants.

[74] We are mindful that on the requirement that the impugned words must be capable of referring to the appellants or of identifying them, the Privy Council in a leading case on the subject – *Knupffer v. London Express Newspaper Limited* [1944] AC 116, had this to say:

> It is an essential element of the cause of action for defamation that the words complained of should be published "of the plaintiff", where he is not named the test of this is whether the words would reasonably lead people acquainted with him to the conclusion that he was the person referred to. The question whether they did so in fact does not arise if they cannot in law be regarded as capable of referring to him.

[75] We are of the view that the fact that the impugned statements refer to the trademark "PYRO" would not without more lead a reasonable reader to understand that it was the second appellant's warehouse that had been raided or that it was the appellants which were being investigated by the third respondent at the material time. This would be the case to a reasonable reader who was even aware that the appellants and their group of companies had been undertaking their trade using the "PYRO" trademark as claimed by the appellants.

[76] The appellants called two witnesses. Their senior sales manager Lai Fook Eng (PW1) and one Liew Kok Foo (PW2), who was a supplier of the parts employed by the appellants. Their evidence was intended by the appellants to support their position, as pleaded, on the meaning to be attributed to impugned statements complained of, and how this would translate into the defamatory meaning complained by the appellants. Their evidence was relevant for the purposes of the knowledge concerning the word "PYRO" and the ownership of the intellectual property relating to the said word that should be imputed of a reasonable reader.

[77] After all, the law in this respect says that the reasonable reader is taken not to be susceptible of suspicion; nor is he avid for scandal. To begin with, the overall tone of the language in the impugned statements is distinctly

neutral without suggesting blame to any party *vis-à-vis* the subject matter of the "Barang Tiruan PYRO". We cannot but agree with the observation made by the High Court that the reasonable reader will not necessarily assume that it was the appellants' warehouse or factory that was raided since Sungai Buloh is a very large industrial area containing several factories and warehouses out of which many companies operate from.

[78] The reasonable reader would merely have understood that the various impugned statements simply affirmed that the first and third respondents were carrying out their investigative duties following a complaint without identifying the warehouse, what more the identities of the suspects. Not only was there no finding of guilt, but also that none could be attributed to any party at that time.

[79] The respondents, as correctly pointed out by the High Court, did not make any disparaging remarks directed at any party, any product or any brand or trademark (other than stating the fact about the confiscation of the counterfeit PYRO products). We should add that neither did evidence show that the third respondent had made any announcement of the subsequent prosecution of the directors of the appellants under the TDA, or linking the same to the earlier raid.

[80] Even if it was true that the appellants were known in the industry to be associated with the "PYRO" products, news of the authorities seizing fake "PYRO" products would not necessarily without more lead a reasonable reader to assume and conclude that the culprit was the appellants.

[81] It could equally be argued that since the appellants were known for such "PYRO" products, the counterfeit versions of "PYRO" must have been or could have been produced by other irresponsible parties. The counterfeit PYRO products could thus have been nefariously produced or sold by a different entity altogether, especially if what was claimed by the appellants that they had substantial goodwill and long-standing business in the PYRO products is true.

[82] The High Court stated the law correctly in that when the court considers the evidence of a witness produced to explain their pleaded ordinary natural meaning of the words, or their imputation, the court must still consider the testimony objectively for, in the final analysis, it is the meaning which reasonable and fair-minded people, relying on their common sense, would understand the words to have (see the High Court decision in *Kumarasamy Naciappan v. The News Straits Times Press (M) Bhd* [2012] CLJU 997; [2012] 1 LNS 997; [2013] 7 MLJ 361).

[83] The following self-explanatory passages as quoted in *Chew Sew Khian v. Saniboey Mohd Ismail & Ors* [2002] CLJU 333; [2002] 1 LNS 333; [2003] 5 MLJ 91 are especially instructive. The first passage we will refer to is from *David Syme v. Canavan* [1918] 25 CLR 234 which stated thus:

> The test of whether the words that do not specifically name the plaintiff refer to him or not in this: Are they such as reasonably in the circumstances would lead persons acquainted with the plaintiff to believe that he was the person referred to? That does not assume that those persons who read the words know all the circumstances or all the relevant facts. But although the Plaintiff is not named in words, he may, nevertheless, be described so as to be recognized; and whether the description takes the form of a word-picture of an individual or the form of a reference to a class of persons of which he is or believed to be a member or any other form, if in the circumstances the description is such that a person hearing or reading the allege libel would reasonably believe that the plaintiff was referred to, that is sufficient reference to him.

[84] The second passage is from *Morgan v. Odhams Press Ltd* [1971] 1 WLR 1239 which emphasised that the test in determining the question of identity is an objective one, as follows:

> In my view, a somewhat more exacting test should be predicated where the question is one of identity. It is not sufficient for the reader to say "I wonder if the article refers to Johnny Morgan" nor is pure speculation sufficient. Nor is it sufficient that a reasonable person believes that the words refer to the Plaintiff. The test is an objective one. The ordinary reader must be fair minded and not avid for scandal. He must not be unduly suspicious. The ordinary reader must have rational grounds for his belief that the words refer to the plaintiff.

[85] It is so trite that he who alleges must prove and the onus is on the person making the allegation – the plaintiff – to do so. This is also enshrined in s. 103 of the Evidence Act 1950. And as case law authorities have so amply stated, the burden in on the appellants as the plaintiffs in a defamation action to prove the words in question are defamatory, refer to them and are published to a third party.

[86] We are cognisant of the fact that the said witnesses of the appellants in the case now before us were called to support the appellants' pleaded case on how the impugned words were understood by the witnesses, which the appellants claimed were defamatory, more for the understanding the innuendo pleaded by the appellants concerning the usage of the word "PYRO" and all related "PYRO" words, and especially also whether the statement could be understood to be referring to the appellants. The appellants contended that the ordinary reader would have understood that the word "PYRO" and all such related words is a trademark developed by the group of companies within the Fitters Group and as a result any reference to the said trademark would have attributed the said statements or allegations to them. And further the appellants must comply with O. 78 r. 3(1) of the Rules of Court 2012, which provides that where the plaintiff alleges the words complained of were used in a defamatory sense other than their ordinary meaning, he must give particulars of the facts and matters on which he relies in respect of such sense.

[87] However, as stated above, only two witnesses were summoned. One – PW1 – purportedly to show the implications encountered by the appellants following the publication and the other – PW2 – on how a third party viewed the same. In essence, the appellants asserted that based on the testimony of these two witnesses, when the word "PYRO" is used, a reasonable reader would have understood this to refer to any of the appellants or the companies within the Fitters Group.

[88] Evidence in any trial is of course to be weighed, not counted. But we find that the High Court was not wrong to disbelieve that PW2 had called the appellants' representative and chastised them after allegedly reading the impugned statements, considering that he was not a customer but a supplier of products to the appellants and thus must have relied on the business of the appellants. In any event, when cross-examined, and questioned by the court, PW2 actually agreed that the impugned statements did not necessarily mean that it was the appellants' products that had been confiscated, for there was a chance or possibility that someone else could also be producing the said PYRO products, thus for all intents and purposes almost wholly negating any utility of his evidence towards supporting the case of the appellants.

[89] As for PW1, his evidence was that after the publication, he was inundated with calls and enquiries from many of the appellants' trade or business partners and clients who had seen and read the publication (and republication) on the internet; and who immediately believed that the appellants were selling or marketing or distributing or owned fake "PYRO" products.

[90] We however note from the record of appeal that in cross-examination, PW1 agreed that he was working with the second appellant company Fitters Marketing Sdn Bhd only. As such, he clearly had no *locus* to give evidence on behalf of the first appellant Fitters Diversified Berhad and the third appellant Pyro-Tech Systems Sdn Bhd. In fact, neither did the appellants – specifically the second appellant, produce any authorisation for PW1 to even testify for his own employer, the second appellant.

[91] At the same time, interestingly, and somewhat curiously, none of the directors of the board of directors of any of the three appellant companies, not a single one, were called to give evidence for the appellants at trial. The submission of the respondents that the absence of the directors had also prevented the respondents to cross-examine the directors of the appellants is also not without merit. And it bears emphasis that all these are despite the obvious fact that the decision to initiate this defamation action must have been made by the boards of the appellants in the first place. This is also not to mention the absence of evidence of losses claimed to have been suffered by the appellants due to the alleged defamation.

[92] Furthermore, the appellants only sued the respondents despite their complaint being also directed against articles published by news articles Utusan Malaysia, Harian Metro and the said blog website http:/diabuatdah.blogspot.com. Neither did the appellants who bear the onus of proving their case against the respondents at trial call any witnesses from amongst the journalists or the blogger who were actually responsible for writing their respective pieces which are claimed by the appellants to be defamatory, *vis-à-vis* the media statement of the third respondent. The appellants also did not offer any explanation for this omission.

[93] We therefore find the High Court was correct when concluding on this point as follows:

> [55] To reiterate, the meaning of the words complained has to be ascertained by this Court objectively. The evidence of SP-1 and SP-2 is of assistance only to understand the alleged imputation of facts that are relied on by the Plaintiffs. Therefore, I am of the view that SP-1 and SP-2's personal interpretation is of no help to the Plaintiffs to prove the objective meaning of the said words. This issue must be interpreted by this Court in accordance with the legal position as I have stated earlier.

[94] In any event, as we have discussed earlier, whilst we disagree with the High Court in its finding that the impugned statements did not bear any defamatory meaning, we are however in agreement with its conclusion that the same did not refer to the appellants. This therefore must mean that the appellants' action in defamation against the respondents fails, and the High Court was entirely correct in dismissing the defamation suit.

Liability For Continued Publication

[95] Although we have dealt with the two principal questions in this appeal, we will also address other related issues of significance raised by the appellants in their memorandum of appeal and submissions before us. It is trite that a cause of action in defamation arises at the point when the words in question are published to third parties. The facts at the point of publication are key (see *Grappelli v. Derek Block (Holdings) Ltd* [1981] 1 WLR 822). We have determined that the words "Barang Tiruan PYRO" and the impugned statements attributed to the first and third respondents did not bear any defamatory meaning when published as at the date of the press conference on 15 June 2015 because reference to the appellants could not be proven.

[96] It therefore follows that despite the alleged continued publication of the impugned statements, the respondents cannot be held liable in light of the decision of the High Court on the trademark ownership of PYRO on 24 March 2017 which adjudged the second appellant as the owner of the PYRO trademark.

[97] The crucial point is since the initial publication did not in the first place identify the appellants, the "continued publication" of the same, exact statement, despite the supervening High Court decision, still did not subsequently change anything about the impugned statements as first published. There was still no reference to the appellants in the same impugned publication. And, neither did, for example, the said High Court decision (or any statement published concerning the decision, none of which was tendered, if any) make any cross-reference to the earlier impugned publication.

[98] The decision of the High Court on the true ownership of "PYRO" on 24 March 2017 and the fact that the criminal charges against the appellants were unsuccessful as they were subsequently granted a discharge not amounting to an acquittal on 4 May 2017, did not in any manner mean that the various actions of the first and third respondents in respect of the investigation, the raid, the seizure and the making of statements to the media, all of which had taken place almost two years prior, become unsustainable. We emphasise that the impugned statements were not defamatory when they were published and they continued to be so even after the said decision of the High Court.

[99] We accordingly agree with the following observation by the High Court:

> [64] As the statements were not originally defamatory, even their continued existence after the outcome of the Civil Suit would change its character. As I have said earlier, the reader of these statements is assumed to be a reasonable person and is neither naive nor suspicious. Such a person would be expected to know and appreciate that the statements were of the situation at the time they were made. The original statements remain concerning the facts that existed on 15.6.2015. A reasonable reader would appreciate that subsequent events may have overtaken the facts of the case especially in circumstances where an investigation is being undertaken by the authorities.

Evidence Of Picture Of Product Linked To Appellants

[100] As stated earlier on, the appellants did try raise a specific point to show that the impugned statements appeared to refer to the appellants. This occurred when the appellants tried, at the stage of the cross-examination of one of the respondents' witnesses, to introduce pictures which appeared in the press statements – specifically in the Harian Metro and the blog articles – of the first respondent who allegedly showed door lever handles claimed to be associated with the appellants. This was objected to by the respondents as it was not pleaded. This objection was upheld by the High Court.

[101] This was not even included in the list of issues to be tried. In our judgment, the High Court was correct. We must state that the un-pleaded matter cannot be considered for it has been emphasised many a times that

it is a cardinal rule in civil litigation that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded (see the Federal Court decisions in, to name a couple, *Giga Engineering & Construction Sdn Bhd v. Yip Chee Seng & Sons Sdn Bhd & Anor* [2015] 9 CLJ 537; and *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944).

[102] In particular, in *Iftikar Ahmed Khan v. Perwira Affin Bank Bhd* [2018] 1 CLJ 415; [2018] 2 MLJ 292, the Federal Court – on the same issue – made the point that a decision based on an unpleaded issue is liable to be set aside, as follows:

> [27] It is settled law that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded: *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 6 MLJ 1, *State Government of Perak v. Muniandy* [1986] 1 MLJ 490, *Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd* [2011] 2 MLJ 141; [2009] 6 CLJ 232. In *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 MLJ 428; [1991] 1 CLJ (Rep) 239 it was held that where a vital issue was not raised in the pleadings, it could not be allowed to be granted and to succeed on appeal. A decision based on an issue which was not raised by the parties in their pleadings is liable to be set aside: *Yew Wan Leong v. Lai Kok Chye* [1990] 2 MLJ 152. In *The Chartered Bank v. Yong Chan* [1974] 1 MLJ 157 the Federal Court set aside the judgment of the trial judge as it was decided on an issue not raised on the pleadings. In that case the trial judge erred in concluding that the pleadings included a claim for breach of contract as well as a claim for libel".

Defence Of Justification

[103] As the impugned statements have been affirmed not to be defamatory, the need for the respondents to prove their defence becomes irrelevant since only if the elements of defamation have been satisfied by the plaintiff, would the burden then shift to the defendant to prove that the words authored by the latter, alleged to be defamatory, are not defamatory (see *Lim Guan Eng v. Utusan Melayu (M) Bhd* [2012] 2 CLJ 619).

[104] However for completeness, since the matter was addressed by the High Court, we shall also deal with the defences raised by the respondents, *albeit* in summary fashion.

[105] The respondents relied on the defences of justification and qualified privilege. It is trite that the burden of proving these defences rests entirely on the respondents as the defendants.

[106] In this regard, for the defence of justification, reference ought to be made to s. 8 of the Defamation Act 1957 which reads:

> Justification 8. In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

[107] It is trite that it is unnecessary to prove the truth of every defamatory allegation if the words not proved to be true do not materially injure the plaintiff's reputation. The defendants need only to show substantial justification of the whole defamation, not the truth of every word of the defamation. And the defendant must prove it on the balance of probabilities.

[108] We agree with the finding of the High Court that the respondents were entitled to rely on the defence of justification. This is because the impugned statements were factually substantially, if not entirely true when made at the press conference on 15 June 2015, as published.

[109] This is especially so considering the indisputable fact that on the date of the publication of the impugned statements, Doretti was the registered proprietor of the relevant trademark under the Trade Mark Act 1976, and further that there was in fact a raid based on the complaint by the then registered proprietor, in pursuance of the investigation carried out by the third respondent into trademark infringement and whether counterfeit products were being produced unlawfully, as well as criminal charges having been filed as a result thereof.

The Defence Of Qualified Privilege

[110] The respondents also relied on the defence of qualified privilege. Two key elements must be shown before one can succeed in relying on the defence of qualified privilege. The first is there is a legal, moral or social duty to make the statement on the one part, and secondly, there is a corresponding interest to receive it on the other part.

[111] The British Columbia Supreme Court in *PB v. RVE* [2007] BCJ No. 2305 identified four main areas where qualified privileged has been recognised. These are first, the protection of one's own interest; secondly, common interest or mutual concern; thirdly, moral or legal duty to protect another's interest; and fourthly the public interest. The item on 'moral or legal duty to protect another's interest' is relevant here. The court held that the assessment is that of an objective test, in the following terms:

> [344] the issue is not whether the defendant had a right to make the communication or thought that he or she had a duty to make it, but rather whether a reasonable person would feel compelled by a duty to make the communication.

[112] This in our view accords well with the pronouncement of the Federal Court in the case of *Dato' Dr Low Bin Tick v. Datuk Chong Tho Chin & Other Appeals* [2017] 8 CLJ 369, as per the following:

> [46] Qualified privilege depends on the occasion upon which the communication is made, and not the communication itself. A qualified privilege occasion is an occasion where the person who makes a communication has an interest or a duty, legal, social or moral to make it to the person to whom it is made, and the person to whom it is so made

A has a corresponding interest or duty to receive it. If the communication were made in pursuance of a duty or on a matter in which there was a common interest in the party making and the party receiving it, the occasion is said to be one of qualified privilege. Whether an occasion is a privileged occasion depends on the circumstances of each case, the nature of the information and the relation of speaker and recipient. It is
B for the judge alone to determine as a matter of law whether the occasion is privileged (*Adam v. Ward* [1917] AC 309; [1916-17] All ER Rep. 157).

[113] It must be emphasised that qualified privilege concerns an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the
C person to whom it is so made has a corresponding interest or duty to receive it. The privilege attaches to the occasion and not the statement. Further, the element of reciprocity is significant (see also the leading authorities of *Abdul Rahman Talib v. Seenivasagam & Anor* [1966] CLJU 5; [1966] 1 LNS 5; [1965] 1 MLJ 142 and *Reynolds v. Times Newspapers Ltd and Others* [2001]
D 2 AC 127).

[114] We do not find any flaws in the assertion that in this case, given its facts and circumstances, the impugned statements were made to fulfil especially the third respondent's responsibility and to promote and protect the interests of the public. This, we accept, is found in the testimony given
E by the first respondent, as follows:

Dalam persidangan akhbar yang diadakan, bukan sahaja persidangan akhbar pada 15 Jun itu, malah di lain-lain persidangan akhbar sekalipun yang saya buat, tujuannya adalah untuk memaklumkan tentang tindakan yang kami ambil dan tujuannya adalah untuk memaklumkan bahawa
F sesuatu perbuatan itu salah dan dalam situ mesejnya adalah untuk mengingati orang ramai supaya sentiasa berhati-hati, jangan mudah tertipu dan kepada pemilik-pemilik harta intelek seperti pemilik-pemilik cap dagang, kami menyatakan bahawa kami bersedia untuk melindungi harta intelek mereka lah. Jadi, itulah peranan kami. Kita nak mewar-warkan kepada orang ramai tentang peranan kami, apa yang kami buat untuk
G kepentingan pengguna. Kita tak mahulah kalau ada peniaga-peniaga yang tidak bertanggungjawab menjual barang-barang contohnya menggunakan jenama yang terkemuka padahal ia dianggap tiruan dan dijual pada harga yang sama dengan yang, yang asli. Jadi, kita nak ingatkanlah supaya pengguna sentiasa berhati-hati dan juga kepada pemilik-pemilik cap dagangan itu, kita nak memberi mesej bahawa adulah kepada kami dan
H kami bersedia untuk melindungi harta intelek mereka. Itu gist nya lah.

[115] In similar vein, in *Tan Sri Dato' Tan Kok Ping, JP lwn. The New Straits Times Press (Malaysia) Bhd & Yang Lain* [2010] 3 CLJ 614, the court held as follows:

I [50] Saya bersetuju dengan hujah peguamcara defendan bahawa tujuan pengedaran, penyiaran dan penerbitan berita itu adalah bagi menunjukkan bahawa di negara ini tiada sesiapa yang bebas daripada undang-undang

sedia ada, maka ia penting dilaporkan jauh sekali bertujuan untuk mendapatkan sensasi terbit daripada penyiaran berita tersebut, lagi pun saya berpuas hati bahawa laporan itu merupakan laporan kepada perkara yang benar- benar terjadi di mana siasatan polis telah pun mengambil tempat, siasatan sahaja tidak bermakna plaintif dimaksudkan bersalah, ini jelas kerana selepas itu tiada pertuduhan dibuat terhadap plaintif di mana-mana mahkamah.

[116] Now, under the law, once qualified privilege is established, the burden is shifted to the plaintiff to show actual or express malice on the part of the defendant in making the impugned publication, which if proven, defeats the defence of qualified privileged (see *Ayob Saud v. TS Sambanthamurthi* [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321).

[117] In the leading case of *Raub Australia Gold Mining Sdn Bhd* (*supra*), the Federal Court further clarified the meaning of malice in the following terms:

[40] "Malice" has been judicially interpreted by the courts as being reckless, unreasonable, prejudice or unfair belief in the truth of the statement. "Malice" may be established by showing that the defendant did not believe in the truth of what he uttered (see: *Horrocks v. Lowe* [1974] 1 All ER 662 and *Watt v. Longsdon* [1930] 1 KB 130 at 154, [1929] All ER 284 at 294).

[41] As defined in the *Osborn's Concise Dictionary* (7th edn), the word "malice" means:

> Ill-will or evil motive: personal spite or ill-will sometimes called actual malice, express malice or malice in fact. In law an act is malicious if done intentionally without just cause or excuse. So long as a person believes in the truth of what he says and is not reckless, malice cannot be inferred from the fact that his belief is unreasonable, prejudiced or unfair (*Horrocks v. Lowe* [1972] 1 WLR 1625).

[42] In law, an act is malicious if done intentionally without just cause or excuse. So long as a person believes in the truth of what he says and is not reckless, "malice" cannot be inferred from the fact that his belief is unreasonable, prejudiced or unfair (see: *Anne Lim Keng See v. The New Straits Times Press (M) Bhd & Anor And Other Appeals* [2008] 6 CLJ 697; [2008] 3 MLJ 492, *Horrocks v. Lowe* (*supra*).

[118] It is of interest to refer to the case *Mohamad Ezam Mohd Nor & Ors v. Tan Sri Norian Mai & Ors* [2013] 3 CLJ 81; [2013] 3 MLJ 110 where the first defendant, who was then the Inspector General of Police was sued, among others, for defamation for the press statement he had issued at a press conference on the arrest of the defendants who were said in the statement to have been involved in violent or aggressive militant activities capable of overthrowing the Government.

[119] The High Court in that case ruled that (not unlike the present case) the first defendant had the legal duty to issue the press statement to inform the public about matters affecting public interest. The court in addressing the defence of qualified privilege stated thus:

> [93] The first defendant as the IGP, the highest-ranking officer in the police force is endowed with the powers under the Police Act 1967, amongst others, to enforce the laws, crime prevention and be responsible for the security of the country. Seen in this context, in my view, it is not only the first defendant's privilege but also, he has a legal duty to make the press statement to members of the press at the press conference to inform the general public/community at large in Malaysia on matters affecting public interest and concern in the country.

[120] However, the defence of qualified privilege failed (unlike in this case before us) because of the finding by the High Court of the presence of malice on the part of the first defendant. The court in that case held as follows:

> [100] Bearing in mind the matters stated, it has been shown none of the allegations hurled at the plaintiffs by the first defendant as contained in the press statement and which the first defendant caused to be published as per the 'berita' in the respective newspaper were true; this implies malice on the part of the first defendant. In the circumstances I find there is proof of malice which vitiates the defence of qualified privilege.

[121] Now, in the instant case before us, we find no error in the finding of no malice by the High Court given that the contents of the impugned statements are essentially neutral in its choice of words and did not contain unnecessary language or aspersions. There was no mention of the appellants nor was it followed up with news on the prosecution of the appellants. The overarching theme was plainly that the matter concerning whether the seized PYRO items were counterfeit was still under investigation. The statements were made professionally by the third respondent in its capacity as the enforcement agency responsible for the matter in a neutral and not partial manner, by demonstrating the work they had undertaken and in order to protect the public.

[122] We thus find the High Court was not in error when it concluded that there was no malice, in the following manner:

> [107] I also do not find any form of malice on the part of the Defendants to negate the right to rely on the defence of qualified privilege. I do not find any evidence of malice either expressly or due to recklessness that could be attributed to the Defendants. The statements were made by the Defendants and their officers as part of their duties to the public.

Claim Of Malicious Falsehood

[123] We should also address *albeit* in summary fashion, the appeal against the decision of the High Court which had dismissed the appellants' claim for malicious falsehood against the respondents.

[124] It is of interest to appreciate that both defamation and malicious falsehood claims are mentioned in the Defamation Act 1957, in particular in its long title which states to be an Act relating to the law of libel and slander and other malicious falsehoods. Both claims essentially concern the publication of false statements. A key distinction between the two however is that in a malicious falsehood claim the statement in question does not have to bear a defamatory meaning. Another is non-necessity of proving damage to reputation. It is essential that the statements in question are published with improper motive or malice, and also that it has caused actual financial loss.

[125] As Gopal Sri Ram JCA (as he then was) explained in *SV Beverages Holdings Sdn Bhd & Ors v. Kickapoo (Malaysia) Sdn Bhd* [2008] 4 CLJ 20; malicious falsehood and libel are distinct torts. In the former, the burden of proof that the words are false, malicious and calculated to damage the plaintiff is on the plaintiff. In the latter however, the plaintiff does not have to prove that the statement is false, because the law presumes that in his favour, that it is false and malicious. It is for the defendant writer to prove that the statement is true or the comment fair, in order to succeed in his defence.

[126] Other than clarifying the meaning of "malice" as set out earlier, the Federal Court in *Raub Australian Gold Mining Sdn Bhd* (*supra*) also usefully and concisely explained the elements of malicious falsehood in the following terms:

> The Law on Malicious Falsehood
>
> [39] In order to establish a claim under malicious falsehood, it is trite law that the plaintiff bears the burden of proving the following elements:
>
> (i) that the defendant published about the plaintiff words which are false;
>
> (ii) that the words were published maliciously; and
>
> (iii) that special damage followed as the direct and natural result of the publication.
>
> (see: *Tan Chong & Son Motor Co Sdn Bhd v. Borneo Motors (M) Sdn Bhd & Anor* [2001] 4 CLJ 296; [2001] 3 MLJ 140; *Ratus Mesra Sdn Bhd v. Shaikh Osman Majid & Ors* [1999] 8 CLJ 499; [1999] 3 MLJ 529; *Kaye v. Robertson* [1991] FSR 62 (EWCA)).

[127] We agree with the finding of the High Court that the appellants had failed to discharge the burden that the statements were false. The appellants failed to show that the impugned statements are false or that the respondents had maliciously made such statements against the appellants, considering the facts and circumstances of the case, especially given the reason for the first and third respondents to have made the press conference as authorities responsible for the subject matter of counterfeit consumer goods.

[128] Furthermore, it certainly cannot be said that the respondents had recklessly made the impugned statements and there is no evidence to even suggest that they did not believe in the truth of the statements.

[129] As the claim for malicious falsehood was not made out, it was as such correctly dismissed by the High Court.

Conclusion And Decision

[130] In conclusion, in light of the foregoing analysis and reasons, we are of the view that there are no appealable errors in the judgment of the High Court to warrant our intervention. We are satisfied that the learned trial judge certainly cannot be said to be plainly wrong in dismissing the appellants' claims of defamation and malicious falsehood against the respondents. We accordingly affirm the order of the High Court and dismiss this appeal, with costs of RM30,000 to the respondents.